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No. 91-1770

In the Supreme Court of the United States

OCTOBER TERM, 1992

FRED W. BEAVERS, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD
AND ADMINISTRATOR OF THE
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the National Transportation Safety Board acted arbitrarily in dismissing petitioner's appeal where petitioner filed his brief and request for an extension after the filing deadline without demonstrating good cause for the delay.

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OPINIONS BELOW

The opinion of the court of appeals is unreported, but the decision is noted at 956 F.2d 265 (Table). Pet. App. 1a-7a. The order of the National Transportation Safety Board is also unreported. Pet. App. 8a-11a.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1992. The petition for a writ of certiorari was filed on May 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also 49 U.S.C. App. 1486(f).

STATEMENT

1. The Administrator of the Federal Aviation Administration (FAA) charged petitioner with violating federal aviation regulations when he disregarded air traffic control instructions while piloting a Cessna 550 at the Philadelphia International Airport on October 27, 1987. Pet. App. 70a-71a.[1] Under the Federal Aviation Act of 1958 (codified as amended in various sections of 49 U.S.C. App.), the FAA Administrator is authorized to suspend a pilot's airman certificate upon "determin[ing] that safety in air commerce or air transportation and the public interest requires" the suspension. 49 U.S.C. App. 1429(a). Pursuant to Section 1429(a), the Administrator issued an order suspending petitioner's airman certificate for 60 days.

2. Petitioner sought further administrative review of the suspension before the National Transportation Safety Board (NTSB or Board). The Board upheld the order.

a. The NTSB can amend, modify, or reverse a suspension order, 49 U.S.C. App. 1429(a), and has adopted regulations governing administrative procedures in such air safety review proceedings pursuant to 49 U.S.C. App. 1903(b)(11). See 49 C.F.R. Pt. 821. The regulations provide that an administrative law judge shall preside over the hearing and issue a decision. 49 C.F.R. 821.35(a).

A party may seek further review of the ALJ's decision by filing a notice of appeal "within 10 days after an oral

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[1] The FAA charged petitioner with violating 14 C.F.R. 91.9, 91.75(b), and 91.87(h) (1989), see Pet. App. 71a, which were recodified in 1990 and currently appear at 14 C.F.R. 91.13 (careless or reckless operation of aircraft), 91.123(b) (compliance with air traffic control instructions), and 91.129(h) (clearance required at airports with operating control towers).

initial decision has been rendered or a written decision or an order has been served." 49 C.F.R. 821.47. NTSB regulations specify that "[e]ach appeal must be perfected within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal." 49 C.F.R. 821.48(a). Where a party files a late brief, the NTSB may dismiss the appeal on its own initiative or on motion of the other party. 49 C.F.R. 821.48(a). Significantly, the NTSB only grants an extension of time to file a brief on a showing of "good cause." 49 C.F.R. 821.11. Prejudice to a party is not a factor the NTSB considers, either under its own regulations and rulings or under its enabling statute.

b. After a hearing, the administrative law judge issued an oral decision upholding the suspension order. Pet. App. 65a-74a. The ALJ informed the parties that they must file any notice of appeal with the NTSB within ten days and file any appeal brief within 50 days. *Id.* at 71a-72a.

Petitioner filed a notice of appeal two days later but did not file a brief within the 50-day period required under 49 C.F.R. 821.48(a). Fifty-five days after the oral decision, petitioner moved for an extension of time to file his brief on the ground that he had not received a copy of the hearing transcript or the judge's order. Pet. App. 60a-61a. In a subsequent motion, petitioner's counsel attributed his miscalculation of the due date to the press of other legal matters, his wife's illness, a worsening of his own diabetic condition in early May and the need to care for his young children. *Id.* at 51a-52a. Petitioner filed his brief days after the brief had been due, accompanied by a motion to accept the late-filed brief. *Id.* at 25a-27a.

By order dated July 30, 1991, the NTSB denied petitioner's motion to accept the brief and granted the

Administrator's motion to dismiss his appeal, stating that petitioner "ha[d] not identified any reason establishing good cause for his failure to file a timely extension request." Pet. App. 10a. The NTSB concluded that counsel's personal problems did not "explain or excuse" counsel's failure to compute the due date correctly following the hearing, and it held that counsel's failure to receive the transcript did not allow him to disregard filing deadlines established by the issuance of the decision. *Id.* at 10a nn.4-5.

3. Petitioner then sought direct review of the NTSB decision in the Fifth Circuit. He challenged the NTSB's decision as arbitrary on two inconsistent grounds: (1) that the NTSB considers late briefs under the good-cause standard but never accepts late extension motions; and (2) that the NTSB had permitted an untimely filed extension motion in a similar case, *Administrator* v. *Hordon*, NTSB Order No. EA-3513 (Mar. 12, 1992).

The Fifth Circuit rejected the first argument and noted that the NTSB actually had considered petitioner's extension motion under the good-cause standard, but had concluded that his reasons did not demonstrate good cause for the delay. Pet. App. 5a-6a. Rejecting the second argument, the court emphasized that the late filing of the extension motion in *Hordon* resulted from a clerical error in performing a task properly delegated by the attorney, rather than a miscalculation of the 50-day period by the attorney himself. The Fifth Circuit noted that the delay in *Hordon* was justifiably excused, unlike in the instant case where Beavers' attorney miscalculated the deadline. *Id.* at 7a. Having concluded that NTSB's application of its good-cause standard in Beavers' case was not arbitrary, the Fifth Circuit denied the petition for review. *Ibid.*

ARGUMENT

The court of appeals correctly found that the NTSB did not act arbitrarily in dismissing petitioner's untimely appeal. The NTSB has established a clear procedural standard which it has applied consistently in this and other cases requiring good cause to excuse late filings. See *Administrator* v. *Hooper*, NTSB Order No. EA-2781, at 3-4 (Aug. 5, 1988). The decision below does not conflict with that of any other court of appeals and no further review is warranted.[2]

1. Petitioner contends without citation of any support (Pet. 6) that the NTSB has adopted an approach requiring all late-filed motions for an extension of time to be rejected, whether or not supported by good cause. Although the NTSB could adopt such a rule, it has not done so. The NTSB considers all extension requests under a standard requiring a showing of good cause, whether requests are made prior to the filing deadline or made late, as in petitioner's case. See *Administrator* v. *Hooper*, NTSB Order No. EA-2781, at 3-4 (Aug. 5, 1988) (stating that the Board would "adhere uniformly to a policy requiring the dismissal, absent a showing of good cause, of all appeals in which timely notices of appeal, timely appeal briefs or timely extension requests to submit those documents have not been filed"); *Administrator* v. *Pinto*, NTSB Order No. EA-3160 (June 28, 1990) (granting extension motion that was untimely by one day upon showing of good cause).

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[2] Petitioner does not argue that there is a circuit split on this issue, but broadly asserts, "[t]he Court should grant this writ as a method of reestablishing fundamental guidelines for agencies and courts reviewing their activities." Pet. 7. Petitioner cites no precedent of this Court that was incorrectly applied in this case, nor does petitioner specify any particular rule the Court should adopt in reviewing administrative decisions.

The NTSB has consistently concluded that counsel's simple miscalculation of filing deadlines does not support a finding of good cause. See *Administrator* v. *Perry*, NTSB Order No. EA-2972, at 2 (July 10, 1989) ("we have consistently rejected error in the calculation of a procedural deadline as establishing good cause for a late filing"); *Administrator* v. *Green*, NTSB Order No. EA-3228, at 2 (Nov. 19, 1990) (finding miscalculation of appeal brief's due date by a day or so does not constitute good cause). The NTSB correctly applied its clear policy to petitioner's late filing.

2. Petitioner also appears to contend (Pet. 6) that the agency's rule is arbitrary and capricious because the NTSB does not consider whether rejecting an untimely brief would cause prejudice to the parties. The NTSB adopted the good cause standard pursuant to its statutory authority to promulgate rules and regulations. 49 U.S.C. App. 1903(b)(11). Neither the statute nor regulations require the NTSB to consider prejudice to a party in rejecting late-filed papers; furthermore, at least one court has upheld the NTSB's application of the good cause standard. See *Union Flights, Inc.* v. *Administrator, FAA*, 957 F.2d 685, 688 (9th Cir. 1992).

This Court has clearly established that a reviewing court may not set aside an agency rule "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). In an often-cited statement, the Court has stressed, "the ultimate standard of review is a narrow one [; t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

The NTSB's choice of the good cause standard clearly satisfies that standard. The agency balanced the harm

caused to parties when the NTSB rejects late filings with the need for all parties to adhere to procedural rules to ensure a prompt and efficient review process.[3] This case provides no reason to reconsider the standard of review or second-guess the NTSB's choice of a procedural rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] The NTSB's authority to design procedural rules taking expeditiousness into account has been upheld in the courts of appeals. See *Brown* v. *NTSB*, 795 F.2d 576, 579 (6th Cir. 1986) ("[The NTSB's] paramount interest in maintaining safe takeoff and landing conditions at airfields authorizes it to design hearing and appeal procedures that will resolve claims as speedily as possible."); *Corey* v. *NTSB*, 822 F.2d 9, 10 (2d Cir. 1987) (noting NTSB's authority to place time limits on filing of appeal briefs).